CONSTRAJAYA SDN BHD

v.

JOHOR COASTAL DEVELOPMENT SDN BHD

HIGH COURT MALAYA, SHAH ALAM
ZULKEFLI AHMAD MAKINUDIN J
[COMPANIES (WINDING-UP) NO: MT4-28-178-2001]
30 JANUARY 2002

COMPANY LAW: *Winding-up - Opposition to petition - Delay in filing affidavit in reply - Companies (Winding-up) Rules 1972, r. 30(2) - Whether contravened - Whether affidavit to be struck out*

COMPANY LAW: *Winding-up - Opposition to petition - Stay of execution - Order for judgment sum stayed by Court of Appeal - Whether order for stay nullifies petitioner's right to maintain action - Whether filing of petition thereafter amounts to abuse of process*

This was a winding-up petition by the petitioner having obtained a judgment sum of RM8,998,400 against the respondent in the High Court. The respondent filed an appeal to the Court of Appeal and obtained a stay of execution against the order. The petitioner then applied to this court for a stay of the winding-up petition. The respondent objected to the winding-up petition and the application for its stay and claimed that the petition should be dismissed.

Held:

[1] The petitioner had contravened r. 30 of the Companies (Winding-up) Rules 1972 when it did not file its affidavit in reply within three days after the respondent filed and served its affidavit in opposition. This is a mandatory requirement for which the petitioner had neither availed any reasons regarding its non-compliance nor applied for an abridgement of time. Thus the petitioner's affidavit in reply was to be rejected. (pp 94 h & 95 a-b)

[2] Since the winding-up petition was based on a judgment sum and the Court of Appeal had granted a stay pending disposal of the appeal, the petitioner lost the right to continue or maintain the action. His persistence in maintaining the said petition despite the stay order amounted to a contemptuous act and an abuse of process. (p 95 f-g)

[3] A High Court judgment which is subject of an appeal cannot be regarded as a final judgment. As the petitioner had knowledge through the respondent's affidavit that there was a *bona fide* dispute as to the debt, it should not be allowed to continue the winding-up proceedings. (p 96 a-c)

[4] If the petitioner's application to stay the petition was granted, then under s. 223 read together with s. 219(2) of the Companies Act 1965 the respondent's business transactions and developments would come to a stand still. This was unjustified, especially as the respondent had obtained a stay from the Court of Appeal. (p 97 e-g)

[5] In its application to stay the petition, the petitioner could not merely rely on the fact that it had filed an appeal to the Federal Court against the Court of Appeal's order for stay. This was a mere speculation and there was no evidence that leave had been granted for appeal to the Federal Court. Even if leave had been applied for, there was no certainty that the appeal would be in the petitioner's favour. (p 98 c-d)

[6] Rule 7(1) of the Companies (Winding-up) Rules 1972 provides that every application in court other than a petition shall be made by motion. The petitioner had merely filed an affidavit in reply to stay the winding-up petition which the admissibility of the said affidavit itself was being challenged. In doing so, the petitioner intended to circumvent r. 7 and this amounted to an abuse of process. There was also no indication as to which provisions of law the petitioner was relying upon in forwarding the application for stay.
(p 98 f-h)

[Petition dismissed with costs. Application for stay denied.]

Case(s) referred to:
Re Lympne Investment Ltd [1972] 2 All ER 385 ***(refd)***
Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn. Bhd. v. Nima Travel Sdn Bhd [1986] 2 MLJ 374 ***(refd)***
Re Pentasia (Pte) Ltd [1979] 2 MLJ 59 ***(refd)***
Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd [1998] 3 CLJ Supp 409 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 219(2), 223
Companies (Winding-Up) Rules 1972, rr. 7(1), 30(2)
Contracts Act 1950, s. 75

For the petitioner - Azhar Harun (KC Nayagam & Jeevanand); M/s Miranda & How
For the respondent - Edwin Lim; M/s Edwin Lim & Co

Reported by M Maheswaran

JUDGMENT

Zulkefli Ahmad Makinudin J:

This is a winding-up petition presented by the petitioner against the respondent on the ground of the respondent being unable to pay its debts to the petitioner for the sum of RM8,998,400 pursuant to the judgment obtained by the petitioner as plaintiff against the respondent as defendant on 13 July 2001 in the Johor Bahru High Court Originating Summons No: 24-1265-2000 (hereinafter referred to as "the High Court order"). In the action filed under the said Originating Summons No: 24-1265-2000 the petitioner as plaintiff seeks declaratory reliefs that the two sale and purchase agreements both dated 13 March 1997 in respect of the property known as Lot 7 and Lot 14 Bahagian C, JB Waterfront City were unlawfully terminated by the defendant by the notice dated 19 April 2000 and that the respondent as defendant is not entitled to forfeit all sums paid as same is a penalty and unenforceable by virtue of s. 75 of the Contracts Act. The said High Court gave judgment in favour of the petitioner as plaintiff and ordered the respondent as defendant to effect a full refund of the entire forfeited sums to the petitioner. The respondent has filed an appeal to the Court of Appeal against the said High Court order and has on 15 October 2001 obtained a stay of execution from the Court of Appeal against the High Court order. The petitioner now intends to apply for a stay of the winding-up petition filed herein which was fixed for hearing on 29 October 2001. The respondent objects to both the winding-up petition and the stay of the petition and prays that the said petition be dismissed with costs.

At the outset of the hearing the learned counsel for the respondent raised a preliminary objection on the filing of the petitioner's affidavit in reply as in encl. 7. It was contended for the respondent that in filing the said affidavit in reply the petitioner has failed to comply with the requirement of r. 30(2) of the Companies (Winding-Up) Rules 1972 ("the said Rules"). Rule 30(2) of the said Rules states as follows:

> (2) Any affidavit in reply to an affidavit filed in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitors.

In this case the respondent filed and served its affidavit in opposition to the petition on the petitioner's solicitors on 17 October 2001. Pursuant to r. 30(2) of the said Rules the petitioner must therefore file its affidavit in reply on or before 20 October 2001. It is my finding that the petitioner in breach of r. 30(2) of the said Rules filed its affidavit in reply in encl. 7 on 26 October 2001. I am of the view that it is a mandatory requirement that the petitioner's

affidavit in reply must be filed within three days from the date of the service of the respondent's affidavit in opposition. I also find that the petitioner has failed to satisfy the court the reasons upon which this court is able to exercise its judicial discretion to overcome the delay in the filing of the petitioner's affidavit in reply. The petitioner did not file or attempt to file any application for an abridgement of time for the said affidavit in reply. No reasons were given for the delay in the filing of the said affidavit in reply. In the circumstances of the case I therefore ruled that the petitioner's affidavit in reply in encl. 7 is to be rejected and should not be taken into account by the court.

Having studied the affidavits filed by the petitioner and the respondent and having heard the submissions of the learned counsels for the petitioner and the respondent I hereby rejected the application of the petitioner to stay the proceedings of the winding-up petition that has been filed by the petitioner against the respondent. I further make an order that the petitioner's winding-up petition is struck out with costs.

As can be seen from the notice issued under s. 218 of the Companies Act 1965 ("the Act") the basis upon which the winding-up petition was presented against the respondent was solely on the ground that the respondent failed to satisfy the judgment sum of RM8,998,400 together with the interest of 8% per annum. Subsequent to the High Court order on 13 July 2001 the respondent filed an appeal to the Court of Appeal and had on 15 October 2001 obtained a stay of execution from the Court of Appeal on the High Court order pending disposal of the appeal. I am of the view that since the winding-up petition is based on a judgment sum and the Court of Appeal has granted a stay of execution on the said High Court order pending disposal of the appeal the petitioner therefore loses its right to continue or maintain the petition. The petitioner can no longer claim that the "judgment" sum of RM8,998,400 as being undisputed. The petitioner's act in continuing to maintain the said petition against the respondent despite stay of execution being ordered by the Court of Appeal clearly amounts to a contemptuous act and an abuse of process. On this point I would like to refer to the case of *Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd* [1998] 3 CLJ Supp 409, wherein his Lordship Rekhraj J at p. 411 had this to say:

> Where the debt is disputed being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is *sub-judice*, and any presentation of a petition for winding-up in the circumstances is an abuse of the process of court, and the courts will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition.

I am of the further view that the High Court judgment which is subject of an appeal cannot be regarded as a final judgment. Hence, if the respondent substantially disputes the said debt of RM8,998,400 the petitioner will not have the *locus standi* to continue or maintain the winding-up petition. In the case of *Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd* [1986] 2 MLJ 374 his Lordship Mahadev Shanker J in dealing with this issue *inter alia* stated that a winding-up petition is not a legitimate means of seeking to enforce payment of debt which is *bona fide* disputed by the company. In the present case I find that there is a substantial dispute which should have been apparent to the petitioner at the very least when they received the respondent's affidavit. The continuation of the winding-up proceedings after they had that knowledge of the disputed debt is not a permissible exercise of the process of the court. On the same issue I would like to refer to the case of *Re Lympne Investment Ltd* [1972] 2 All ER 385 wherein his Lordship Megarry J at p. 387 had this to say:

> Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issue may be resolved in other proceedings. That practice, I may say, seems to stem from *Re London and Paris Banking Corp* [1875] LR 19 Eq 444. The companies court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out.

As regards the said disputed debt of RM8,998,400 I shall refer to the respondent's affidavit in opposition (encl. 6) which states in detail the respondent's grounds in objection to the winding-up petition. The respondent was the developer and vendor of the project known as the Johor Bahru Waterfront City and the petitioner was the purchaser for two lots in Parcel C known as lot 7 and 14. The respondent has alleged that the petitioner breached cl. 8.1 of the sale and purchase agreements ("the said agreements") in failing to pay the instalments under the schedule of payment and as a result thereof the said agreements were terminated by the respondent. In consequence of the termination of the said agreements the respondent invoked cl. 8.2 of the agreements which allows the respondent to forfeit all previous instalment payments made by the petitioner. As a result of the petitioner's breach of contract, the respondent claimed that it had suffered losses and had on 7 August 2001 filed an action at the Johor Bahru High Court Civil Suit No: 22-382-01 for special damages amounting to the sum of RM10,094,475.98. The suit is currently pending at the Johor Bahru High Court. The issue of forfeiture or refund of the sum RM8,998.400 is currently pending hearing at

the Court of Appeal and that the Court of Appeal had on 15 October 2001 granted a stay of execution of the High Court order pending disposal of the appeal.

In exercising my discretion to strike out the petitioner's winding-up petition against the respondent I would like to deal with the effect of the provision of s. 223 of the Act on the respondent if the petition is allowed to be stayed. Section 223 of the Act reads as follows:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of winding-up by the court shall unless the court otherwise orders be void.

Section 219(2) of the Act on the other hand states as folllows:

> 219. Commencement of winding-up by the Court.
>
> (1) ...
>
> (2) In any other case the winding-up shall be deemed to have commenced at the time of the presentation of the petition for the winding-up.

It would appear that by virtue of s. 219(2) of the Act the winding-up of the respondent company is deemed to have commenced at the time of the presentation of the winding-up petition. Therefore reading s. 223 and s. 219(2) of the Companies Act together would mean that the respondent's business transactions and trade including any transfer of shares or properties would be paralysed by the petitioner's act of filing and maintaining the winding-up petition. It can be seen from the petition that the respondent is a huge development company with the paid up capital of RM10,000,000. I am of the view that it is unjustifiable that the respondent's business transaction and developments should come to a stand still just because of the winding-up petition presented by the petitioner and especially so when the respondent had successfully obtained an order for stay of execution from the Court of Appeal. On this point I would like to refer to the case of *Re Pentasia (Pte) Ltd* [1979] 2 MLJ 59 wherein his Lordship Sinnathuray J at p. 60 had this to say:

> A petition for the winding-up of a company is a grave matter for the Company and for those who have dealings with the Company. Section 219(2) of the Companies Act provides that commencement of winding-up by the court "shall be deemed to have commenced at the time of the presentation of the petition for the winding-up". The sections that follow spell out important consequences that affect a variety of matters. Some of them are that creditors are deprived of their remedies against the company; all actions by and against the Company come to a standstill; and, any disposition of property including any transfer of

shares or alterations of the status of members of the Company is terminated. The cumulative effect is that a company, upon a petition for winding-up presented against it, cannot carry on business as outsiders will be reluctant to have dealings with it.

Now, as regards an adjournment it is at the discretion of the court. Having regard to the foregoing, I am of the view that except for a short adjournment to remedy technical matters relating to a petition, any other adjournment must be an exception rather than the rule as it will be prejudicial to the company. (See: *Re Chapel House Colliery Co.* (1) per Cotton L.J. at p. 268). It is therefore imperative that the winding-up of a company which cannot pay its debts must be seriously weighed, and once proceedings are commenced they must be prosecuted expeditiously.

It is also my view that the petitioner's ground in applying to stay the winding-up petition on the basis that it has filed an appeal to the Federal Court against the Court of Appeal's order for stay of execution is unjustifiable for the simple reason that there is no evidence adduced by the petitioner that leave has been applied for the appeal to the Federal Court and that it is a mere speculation. Even if leave has been applied for there is no certainty that the result of the appeal will be in the petitioner's favour. I take the view that in balancing between the justification for the stay of the winding-up petition sought for by the petitioner and the devastating effect it will cause to the respondent, it tilts in favour of the respondent that the petition should not be allowed to be stayed and that it should be struck out. The petitioner is at liberty to file a fresh winding-up petition should the petitioner succeed in overturning the Court of Appeal order for stay of execution. Until and unless the Federal Court has granted leave in favour of the petitioner the fact remains that the current binding order would still be the Court of Appeal's order for stay.

I would hasten to state here that the petitioner has not even filed any application for stay of the winding-up petition. The petitioner merely filed an affidavit in reply in which the admissibility itself is being challenged for non-compliance with r. 30(2) of the said Rules. The petitioner also failed to state under what provisions of the law that the petitioner is applying to stay the winding-up petition which is already fixed for hearing on 29 October 2001. Pursuant to r. 7(1) of the said Rules every application in court other than a petition shall be made by motion. The petitioner in failing to file a motion for stay of the winding-up petition now intends to circumvent r. 7(1) of the said Rules by filing an affidavit in reply and prays for an order for stay of the petition. I am of the view that the petitioner's act clearly amounts to an abuse of process.

Finally I would like to deal with the effects of the winding-up petition presented by the petitioner against the respondent on third parties and the public at large to show the justification as to why the petition should not be allowed to be stayed. The respondent was and still is the developer and vendor for the project known as the Johor Bahru Waterfront City. The said project is a joint venture and privatisation project between the respondent and the State Government of Johor. As a developer and vendor for the said project, the respondent is responsible under a number of sale and purchase agreements with other purchasers of the lots to complete the works and infrastructure of the project. As a result of the winding-up petition the respondent is unable to continue to complete the works or develop the said project. I am in agreement with the submission of learned counsel for the respondent that the inability of the respondent to continue or complete the works on the project will certainly affect the rights of other third party purchasers of the project. The Johor Waterfront City project is a huge joint venture project with the State Government of Johor and in view of the massive capital injected and the manpower having been spent on the project, the winding-up of the respondent will result in an irreparable damage to the respondent and may even affect the economy of the State of Johor. Under cl. 12(1)(b) of the joint venture and privatisation agreement between the respondent and the State Government of Johor the said agreement will be terminated if the respondent is wound up. It can therefore be seen that the winding-up petition presented against the respondent is a very serious matter as it will cause undue hardship to third party purchasers and the State of Johor. It is also noted that the respondent is a subsidiary of Pilecon Engineering Bhd, a main board company listed on the Kuala Lumpur Stock Exchange. The presentation of the said petition in my view has adversely affected the reputation, business, and standing of both the respondent and Pilecon Enginering Bhd. It was also affirmed in the respondent's affidavit in opposition that the respondent is an active and solvent company and is of an on-going concern.

Based on the above-mentioned grounds and in view of the fact that the Court of Appeal has granted the respondent an order for stay of execution of the said Johor Bahru High Court order pending appeal, I therefore strike out the winding-up petition presented herein by the petitioner with costs.